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7 ONE FAIR WAGE, INC.,  
8 Plaintiff,  
9 v.  
10 DARDEN RESTAURANTS INC.,  
11 Defendant.

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Case No. [21-cv-02695-EMC](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION TO DISMISS**

Docket No. 59

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14 Plaintiff One Fair Wage, Inc. ("OFW") has sued Darden Restaurants, Inc. for employment  
15 discrimination based on sex and race in violation of Title VII. Previously, following remand from  
16 the Ninth Circuit, the Court dismissed OFW's first amended complaint ("FAC") on the basis that  
17 it had failed to establish Article III standing to pursue its claims. The Court, however, gave OFW  
18 leave to amend. OFW filed a second amended complaint ("SAC"), and Darden has now moved to  
19 dismiss that pleading, again based on lack of Article III standing. Darden also argues that OFW  
20 lacks statutory standing to proceed with the suit.

21 Having considered the parties' briefs, as well as the oral argument of counsel, the Court  
22 hereby **DENIES** the motion to dismiss for lack of Article III standing. However, the Court  
23 essentially reinstates its prior order dismissing the case for lack of statutory standing and the  
24 motion to dismiss is **GRANTED** to that extent.

25 **I. FACTUAL & PROCEDURAL BACKGROUND**

26 As alleged, OFW is an "organization seeking to lift millions of tipped and subminimum-  
27 wage-earning employees nationally out of poverty by requiring all employers to pay the full  
28 minimum wage as a cash wage with fair, non-discriminatory tips on top. [OFW] focuses

1 specifically on helping employees in the restaurant industry.” SAC ¶ 7.

2 “Darden is the largest operator of full-service restaurants in the world. It operates eight  
3 prominent restaurant chain brands, including The Olive Garden, LongHorn Steakhouse, and the  
4 Capital Grille.” SAC ¶ 8.

5 OFW initially filed suit against Darden in April 2021. *See* Docket No. 1 (complaint). In  
6 its complaint, it alleged that Darden had two policies relating to wages and tipping that resulted in  
7 sex and race-based discrimination. Those policies are referred to as the “cash wage policy” and  
8 the “tipping policy.” Below is how the policies are described in the operative SAC.

9 A. Cash Wage Policy

10 Under federal law, an employee may be paid less than the minimum wage (*i.e.*, a  
11 subminimum wage) if she gets tips *and* the combined total of the employee’s wages and tips meet  
12 the minimum wage. *See* SAC ¶ 2. If the combined total does not meet the minimum wage, then  
13 the employer has to make up the difference, *i.e.*, to bring the employee up to the minimum wage.  
14 *See* SAC ¶ 2.

15 Darden has a policy that requires local managers to pay the lowest, legally-permissible  
16 cash wage to all tipped employees. *See* SAC ¶¶ 2, 17-18. This has resulted in increased sexual  
17 harassment of tipped employees. *See* SAC ¶ 33 (“Darden employees paid a subminimum wage  
18 pursuant to the cash wage policy suffered more and worse sexual harassment than Darden  
19 employees paid at least the minimum wage.”). “Empirical evidence confirms that paying a  
20 subminimum wage increases sexual harassment.” SAC ¶ 61 (citing reports such as *The Glass*  
21 *Floor: Sexual Harassment in the Restaurant Industry* as well as a survey conducted by OFW). So  
22 does anecdotal evidence. *See* SAC ¶ 66 (citing articles). The increased sexual harassment is  
23 attributable to managers, coworkers, and customers. *See* SAC ¶ 61. This occurs in several ways.  
24 For example:

25 • *Managers.* “[A] subminimum wage puts great pressure on tipped employees to  
26 have the customers, rather than Darden, pay their employees their legally-required  
27 wages.” SAC ¶ 4. The greater the tips, the less likely Darden has to make up the  
28 difference in order to satisfy the minimum wage. “This, in turn, means that

1                   managers have an incentive to ignore, indulge, or even encourage sexual  
2                   harassment, including requiring or encouraging employees to flirt or dress  
3                   suggestively.” SAC ¶ 4; *see also* SAC ¶ 62 (citing *The Glass Floor* report which  
4                   “found that female employees paid a subminimum wage were ‘three times more  
5                   likely to be told by management to alter their appearance and to wear sexier, more  
6                   revealing clothing’”). In addition, “managers sexually harass subminimum wage  
7                   workers more than other workers because subminimum wage workers protest less  
8                   out of a well-founded fear that managers will retaliate by assigning them worse  
9                   shifts or less-desirable sections of the restaurant, thereby leading to less tips.” SAC  
10                  ¶ 62.

- 11                  • *Coworkers.* “Similarly, cooks and other ‘back-of-the house’ workers sexually  
12                  harass subminimum wage workers more than other workers because subminimum  
13                  wage workers protest less out of a well-founded fear that these coworkers will  
14                  retaliate by preparing food in a way that doesn’t match customers’ demands, again  
15                  leading to less tips.” SAC ¶ 62; *see also* SAC ¶ 64 (citing *The Glass Floor* report).
- 16                  • *Customers.* “[B]ecause employees depend on receiving enough tips to survive,  
17                  ‘customers can feel entitled to treat servers inappropriately,’” SAC ¶ 63 (citing,  
18                  e.g., *The Glass Floor* report), and employees begrudgingly acquiesce to such  
19                  conduct (particularly as they may also suffer retaliation from management if they  
20                  reject the conduct). *See* SAC ¶ 65 (citing, *inter alia*, *The Glass Floor* report).  
21                  Furthermore, “by being forced or encouraged to dress suggestively or flirt to get  
22                  more tips, that worker is more vulnerable to sexual harassment from customers.”  
23                  SAC ¶ 63.

24                  B. Tipping Policy

25                  Darden has a “policy or practice of encouraging and facilitating tipping for jobs like  
26                  servers and bartenders, which results in customers directly determining a substantial part of these  
27                  tipped employees’ total wages.” SAC ¶ 70; *see also* SAC ¶ 28 (“The intent and effect of Darden’s  
28                  policy is that Darden’s customers directly determine a large portion of the wages paid to Darden’s

1 tipped employees.”). “But Darden has failed to mediate that process (*e.g.*, ensure that customers  
2 do not consider race or any other prohibited characteristics in deciding what amount to tip, to  
3 ensure that employees’ take-home pay is untainted by such considerations),” SAC ¶ 70, which  
4 results in racial or ethnic minorities being tipped less than their white counterparts. For instance:

- 5 • Racial and ethnic minorities tend to be tipped less, as indicated by, *inter alia*, a poll  
6 that OFW conducted of Darden workers, *see* SAC ¶ 71 (alleging that “Darden’s  
7 servers of color who received any tips in 2020 received roughly 82.04% of the tips  
8 per hour that Darden’s white servers who received any tips in 2020 received”);  
9 SAC ¶¶ 76-77 (citing articles on racially discriminatory tipping), but Darden has  
10 not taken any steps to “stop the practice of customers setting wages by caprice  
11 rather than merit.” SAC ¶ 70.
- 12 • Also, the tipping policy allows “local manager biases to affect employees’ wages.  
13 Forcing employees to be paid in tips without mediating that process places great  
14 importance on the shifts worked and sections covered for at least two reasons:  
15 dinner shifts and shifts on prime nights like weekends generally result in higher tips  
16 than lunch shifts and shifts on weekdays; and prime seating sections within each  
17 restaurant generally result in higher tips than non-prime sections because customers  
18 in prime sections may be wealthier, spend more money, or be used to paying higher  
19 tips. But Darden’s tipping policy has the effect of local managers relegating  
20 servers of color and bartenders of color to less-lucrative shifts and less-prime  
21 sections, which results in them receiving less in tips based on their race.” SAC ¶  
22 72.

23 Similar to above, empirical research shows that the disparity in tipping between  
24 racial/ethnic minorities and their white counterparts “is a predictable consequence of maintaining  
25 a policy or practice of encouraging and facilitating tips without mediation”; also, anecdotal  
26 evidence confirms that customers generally tip white servers more than servers of color. *See* SAC  
27 ¶¶ 76-77 (citing multiple articles).<sup>1</sup>

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28 <sup>1</sup> According to Plaintiffs, Darden could have profitably operated without its cash wage and tipping

1 C. Order re Statutory Standing

2 Darden responded to the original complaint with a motion to dismiss in which it argued,  
3 *inter alia*, lack of Article III and statutory standing. The Court declined to address the issue of  
4 Article III standing but did hold that OFW lacked statutory standing to proceed with its claims.  
5 See Docket No. 30 (Order at 23, 28). It explained as follows:

6 Simply put, OFW cites no case law establishing that a non-employee  
7 – here, an advocacy organization – has standing to challenge an  
employment practice, particularly where the alleged injury it  
8 contends renders it “aggrieved” is either purely ideological or  
entirely derivative of the injury directly suffered by actual  
employees.

9 The sweeping and implausible nature of OFW’s statutory standing  
10 theory is underscored by the fact that, if accepted, it would  
11 circumvent class certification pursuant to Rule 23 and its  
12 requirements of numerosity, commonality, typicality, and adequate  
13 representation for class certification under Rule 23(a) and (where  
14 monetary relief is sought) predominance superiority, and  
15 manageability under Rule 23(b)(3). OFW’s broad standing  
16 approach would ignore the protection afforded to the class via Rule  
17 23’s requirements of notice, objection rights, and judicial scrutiny of  
any class settlement. This is particularly pertinent here, as there  
18 may well be employees who object to the changes sought by OFW  
19 to eliminate unmediated tipping. Under OFW’s proposed  
20 procedure, any advocacy organization such as OFW could sidestep  
21 Rule 23 and sue for what is tantamount to classwide relief – as OFW  
22 effectively seeks here.

23 Docket No. 30 (Order at 28).

24 OFW appealed, and the Ninth Circuit reversed on the ground that this Court “was  
25 obligated to resolve first whether OFW had Article III standing, unless it can explain why another  
26 issue – including OFW’s standing to bring suit under Title VII – is dispositive and subject-matter  
27 adjacent, thus coming within the *Steel Co.* line of cases.” Docket No. 37 (9th Cir. Order at 7).

28 D. Order re Article III Standing

29 On remand, the Court allowed OFW to file a FAC so as to support Article III standing.

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30 policies. See, e.g., SAC ¶ 83 (suggesting that, instead of the cash wage policy, Darden could have  
31 had a policy under which there was a “cash wage ceiling equal to the non-tipped minimum  
32 wage”); SAC ¶ 86 (suggesting that, instead of the tipping policy, Darden could have, e.g.,  
33 “requir[ed] employees to pool their tips” or “minimiz[ed] the effects of tipping by adding a  
34 standard service charge to all bills to be paid to employees and letting customers tip on top (which  
35 very few do, thereby bypassing most customers’ tip choices”)).

1     See Docket No. 42 (minutes). Darden then moved to dismiss. In August 2023, the Court granted  
2     the motion to dismiss for lack of Article III standing.

3                 The Court noted that the injury claimed by OFW was speculative. See Docket No. 54  
4     (Order at 12). OFW asserted that it was injured as a result of Darden's policies because the  
5     policies resulted in increased sexual harassment and in racial discrimination to Darden employees,  
6     and employees had to deal with the impacts of such harassment and discrimination "during non-  
7     work hours that they would otherwise devote to assisting OFW in its lobbying and advocacy  
8     efforts." Docket No. 54 (Order at 9). The Court stated: "OFW may have sufficiently alleged that  
9     Darden's policies directly injure Darden employees, but unlike in *Havens Realty*, where Havens  
10    directly interfered with *HOME*'s operations, OFW has failed to allege a sufficient nexus between  
11    [1] that injury to Darden employees and [2] an injury to *OFW* as an organization." Docket No. 54  
12    (Order at 10) (emphasis in original). "There is no showing that employees subject to increased  
13    harassment or discrimination cannot find the time and will not make the effort to volunteer their  
14    stories to OFW." Docket No. 54 (Order at 11).

15                 The Court then stated that, "as a consequence of the speculative nature of the alleged  
16    injury, OFW is likewise unable to sufficiently establish causation and redress." Docket No. 54  
17    (Order at 12).

18                 Here, whether Darden employees' failure to assist OFW in its  
19    lobbying efforts can be traced to the effects of the challenged  
20    policies is speculative, at least on the current record. The FAC does  
21    not provide a single example in which a Darden employee sought to  
22    lobby on OFW's behalf but was prevented from doing so due to  
23    Darden's policies.

24                 Docket No. 54 (Order at 13). "Darden employees may well only involve themselves with OFW  
25    because it is now offering 'worker center' services; nothing indicates that the same Darden  
26    employees would, as a result, involve themselves with OFW's lobbying and advocacy efforts."  
27                 Docket No. 54 (Order at 13).

28                 The Court thus dismissed OFW's FAC but gave the organization leave to amend "to  
29    sufficiently allege a nexus between the injury to Darden employees and OFW's organizational  
30    injury." Docket No. 54 (Order at 14).

1 E. SAC's Allegations re Standing

2 OFW has now filed its SAC. In the SAC, OFW continues to challenge Darden's cash  
3 wage policy and tipping policy as described above. *See also* Opp'n at 3 (summarizing the two  
4 policies). The SAC also contains new allegations on standing. These allegations begin at ¶ 90.

5 To wit:

- 6 • OFW's "core mission" is to "lobby[] and advocat[e] to end subminimum cash wage  
7 policies and unmitigated tipping policies." SAC ¶ 97.
- 8 • "If Darden did not maintain policies, many Darden employees would be ready,  
9 willing, and able to aid One Fair Wage in lobbying against subminimum cash wage  
10 policies and unmitigated tipping policies during their non-work hours by sharing  
11 first-hand at lobbying events how such policies subject them to poverty wages and  
12 other horrific terms and conditions of employment." Compl. ¶ 91.
- 13 • "However, because Darden maintains these policies, Darden has forced these  
14 employees to instead spend their non-work hours recovering from and dealing with  
15 the increased sexual harassment they suffered at work (e.g., getting therapy from  
16 mental healthcare professionals, seeking support from and brainstorming  
17 harassment avoidance and mitigation techniques with their family and friends,  
18 working extra hours and other jobs to make up for the decreased pay they receive  
19 due to the increased sexual harassment, or working with an attorney to pursue  
20 sexual harassment dispute resolution against Darden) or recovering from and  
21 dealing with the race-based earnings deficit they suffered at work (e.g., seeing a  
22 therapist to deal with the negative effects of taking home such paltry and lesser tips  
23 because of their race, working extra hours and other jobs to make up for the paltry  
24 and lesser tips they received due to their race; working with an attorney to pursue  
25 race discrimination dispute resolution against Darden)." SAC ¶ 92.
- 26 • "As a result of Darden's policies eating up its employees' precious non-work time  
27 – time that otherwise could have and would have been spent helping One Fair  
28 Wage pursue their shared interest – One Fair Wage has been forced to work harder

1 and expend more of its time, energy, focus, and resources to secure as advocates  
2 workers who have experienced the harms wrought by subminimum cash wage  
3 policies and unmitigated tipping policies and are ready, willing, and able to speak  
4 out against those policies in lobbying efforts.” SAC ¶ 93; *see also* SAC ¶ 98  
5 (alleging that the policies have “deprived One Fair Wage of its most valuab[l]e  
6 resour[c]e – employee voices – forcing One Fair Wage to conduct [a] Survey out of  
7 self-preservation”).

- 8 • OFW has two concrete examples in which a Darden employee would have been a  
9 volunteer/voice for OFW but for Darden’s cash wage and/or tipping policies.
  - 10 ○ *Jillian Melton.* Ms. Melton is a Black woman who worked as a server,  
11 bartender, and trainer for Darden at its Seasons 52 restaurant in Memphis,  
12 Tennessee, from 2014 until 2020. *See* SAC ¶ 101. Ms. Melton experienced  
13 and witnessed race-based tip differentials because, *e.g.*, “her managers  
14 would not assign sections of the restaurant with bigger parties who were  
15 more likely to tip her or other servers of color, assigning those sections  
16 instead to white servers because of their race.” SAC ¶ 103. Also, Ms.  
17 Melton was sexually harassed by customers who “knew they had power  
18 over employees [such as her] who were paid a subminimum cash wage with  
19 tips on top” – *e.g.*, customers “would place their hands around her waist,  
20 grab her arm suggestively, make sexual comments about how she was  
21 shaped or how pretty she was, or invite her back to their house.” SAC ¶  
22 105. Ms. Melton’s manager further forced her to serve customers even if  
23 they had sexually harassed her. *See* SAC ¶ 106. Ms. Melton assisted OFW,  
24 both when she worked for Darden as well as after. *See* SAC ¶ 111. For  
25 example, OFW researchers interviewed Ms. Melton for reports on the  
26 effects of the subminimum wage on restaurant workers and cited her in their  
27 published research. *See* SAC ¶ 112. “[Ms.] Melton always wanted to do  
28 more to help [OFW], but she was unable to do so”; “the low tips she

1 received and the sexual harassment she endured made it hard to participate  
2 at the level that she desired while still making a living.” SAC ¶ 113; *see*  
3 *also* SAC ¶ 114 (alleging that Ms. Melton was forced “to put in even more  
4 hours at Darden, thereby forfeiting her ability to help One Fair Wage  
5 further”). “[Ms.] Melton was also afraid that Darden might retaliate against  
6 her if she spoke out too much about that discrimination and harassment  
7 because many of the restaurants in Memphis were operated by Darden.”  
8 SAC ¶ 115; *see also* SAC ¶ 117 (alleging that two of Ms. Melton’s  
9 coworkers similarly feared retaliation).

10 ○ *Zain Youssef.* Mr. Youssef is a Middle Eastern man who worked as a server  
11 at Darden’s Olive Garden restaurant in Jacksonville, Florida, in 2017 and  
12 then again in 2023. *See* SAC ¶ 118. Mr. Youssef experienced and  
13 witnessed race-based tip differentials because, *e.g.*, “his managers would  
14 assign better tables with bigger parties who would tip more, better sections  
15 of the restaurant with larger tables likely to tip more, and better shifts (like  
16 Friday nights) with greater tips to white servers than they would assign to  
17 servers of color like Youssef because of their races.” SAC ¶ 120. “Because  
18 of [his] paltry tip earnings, which were lower than they should have been  
19 because of his race, as well as the multiple jobs those earnings forced him to  
20 work, [Mr.] Youssef had practically no free time to symbolically repay One  
21 Fair Wage for its cash assistance<sup>[2]</sup> and lobbying efforts by appearing at  
22 One Fair Wage lobbying events in 2023 or being interviewed by One Fair  
23 Wage’s researchers for its research papers.” SAC ¶ 127. “Had [Mr.]  
24 Youssef not been paid less in tips because of his race and not been forced to  
25 work a second job to make ends meet, [Mr.] Youssef would have  
26 volunteered to help One Fair Wage in his free time.” SAC ¶ 128; *see also*

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28 <sup>2</sup> During the COVID-19 pandemic, OFW provided Mr. Youssef with cash assistance from its  
Emergency Coronavirus Relief Fund. *See* SAC ¶ 124.

1 SAC ¶ 129 (alleging that, according to OFW’s Chief of Staff, Senior  
2 Director, and Co-Founder (Fekkak Mamdouh), “it is common for recipients  
3 of cash assistance from the Fund to want to help One Fair Wage,” but they  
4 cannot because they do not “have enough free time to do so [as] they need  
5 to work more to offset their discriminatorily low wages; they are spending  
6 their non-work time dealing with the repercussions of discrimination and/or  
7 harassment; and they fear retaliation from Darden . . . if they speak out”).

- 8 • In addition to the above, “One Fair Wage has expended its resources to help  
9 Darden employees who have suffered disparate impact because of either or both of  
10 these policies in an effort to free up those employees’ non-work time . . . and  
11 enable such employees to help One Fair Wage advocate against such policies. For  
12 example, One Fair Wage has spent its resources connecting complaining Darden  
13 workers with attorneys to represent them in dispute resolution against Darden,  
14 connecting sexual harassment survivors at Darden with therapists and other social  
15 service providers, and offering job opportunities and administering payments from  
16 a Coronavirus Emergency Relief Fund to Darden workers who complained of  
17 increased sexual harassment and/or race-based tip differentials.” SAC ¶ 94  
18 (emphasis added). One Fair Wage has spent time on this activity “instead of  
19 spending its time lobbying or advocating.” SAC ¶ 95.
- 20 • One Fair Wage’s President (Saru Jayaraman) spends “significant” time “dealing  
21 with complaints from Darden employees who would prefer to be spending their  
22 non-work time lobbying against subminimum cash wages and unmitigated tipping  
23 policies, but cannot due to the effects of Darden’s policies.” SAC ¶ 96. In  
24 addition, One Fair Wage’s Research Director (Julia Sebastian) “spends roughly  
25 one-fourth of her time . . . dealing with such complaints from Darden employees  
26 and otherwise responding to the effects of the policies on those employees instead  
27 of directing her efforts toward lobbying.” SAC ¶ 96. Moreover, “[m]any other  
28 One Fair Wage employees and consultants have spent at least a portion of their

1 work time dealing with such complaints and otherwise responding to the effects of  
2 the policies on Darden employees instead of organizing and hosting lobbying or  
3 advocacy events." SAC ¶ 97.

4 **II. DISCUSSION**

5 A. Legal Standard

6 A motion to dismiss for lack of standing is brought pursuant to Federal Rule of Civil  
7 Procedure 12(b)(1). *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th  
8 Cir. 2010) (noting that, "[b]ecause standing and ripeness pertain to federal courts' subject matter  
9 jurisdiction, they are properly raised in a Rule 12(b)(1) motion to dismiss"). Such a motion can be  
10 facial in nature or factual. *See Pride v. Correa*, 719 F.3d 1130, 1139 (9th Cir. 2013).

11 "In a facial attack, the challenger asserts that the allegations contained in a complaint are  
12 insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the  
13 challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal  
14 jurisdiction." *Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

15 In resolving a factual attack on jurisdiction, the district court may  
16 review evidence beyond the complaint without converting the  
17 motion to dismiss into a motion for summary judgment. The court  
18 need not presume the truthfulness of the plaintiff's allegations.  
19 "Once the moving party has converted the motion to dismiss into a  
20 factual motion **by presenting affidavits or other evidence** properly  
21 brought before the court, the party opposing the motion must furnish  
22 affidavits or other evidence necessary to satisfy its burden of  
23 establishing subject matter jurisdiction."

24 *Id.* (emphasis added).

25 Where a factual motion to dismiss is made and only written materials are submitted for the  
26 court's consideration (*i.e.*, no full-on evidentiary hearing is held), a plaintiff need only establish a  
27 *prima facie* case of jurisdiction. *See Societe de Conditionnement en Aluminum v. Hunter Eng'g*  
28 *Co.*, 655 F.2d 938, 942 (9th Cir. 1985); *cf. Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d  
1280, 1285-86 (9th Cir. 1977) (adopting that approach where personal jurisdiction is at issue). In  
other words, a plaintiff need only submit written materials "to demonstrate facts which support a  
finding of jurisdiction in order to avoid a motion to dismiss." *Id.* at 1285. If an evidentiary  
hearing is held, the plaintiff has the burden of proving subject matter jurisdiction by a

1 preponderance of the evidence. *See Societe de Conditionnement*, 557 F.2d at 942; *see also*  
2 *Mecinas v. Hobbs*, 30 F.4th 890, 896 (9th Cir. 2022) (indicating that, “[a]t that point, the court  
3 may resolve any factual disputes concerning the existence of jurisdiction,” unless the jurisdictional  
4 issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the  
5 resolution of factual issues going to the merits).

6 In the case at bar, “Darden expressly asserts both a facial and factual challenge.” Mot. at  
7 5. However, Darden did not provide any evidence to support its factual attack and therefore its  
8 challenge is effectively a facial one.

9 Darden disagrees. Darden suggests that it was entirely within its rights to make a factual  
10 challenge without offering any evidence of its own because it is OFW’s burden – as the plaintiff –  
11 to prove subject matter jurisdiction. *See Colwell v. HHS*, 558 F.3d 1112, 1121 (9th Cir. 2009) (“In  
12 support of a motion to dismiss under Rule 12(b)(1), the moving party *may* submit ‘affidavits or  
13 any other evidence properly before the court . . . . It then becomes necessary for the party opposing  
14 the motion to present affidavits or any other evidence necessary to satisfy its burden of  
15 establishing that the court, in fact, possesses subject matter jurisdiction.’”) (emphasis added). In  
16 other words, Darden argues that OFW’s failure to provide any evidence to support subject matter  
17 jurisdiction means that Darden’s motion should be granted.

18 If the Court were to conduct a full-on evidentiary hearing on the issue of subject matter  
19 jurisdiction, and OFW failed to provide any evidence, Darden would be right. However, at this  
20 juncture, despite Darden’s attempt to frame its motion as a factual challenge to standing, neither  
21 Darden nor OFW has submitted any evidence. Thus, as a practical matter, the motion necessarily  
22 turns on the pleadings only, and thus OFW need only establish a *prima facie* case of subject  
23 matter jurisdiction. So framed, it is fair to credit the allegations in OFW’s pleading.

24 Accordingly, the Court treats the challenge made by Darden to a facial one.

25 B. Standing

26 To have standing, plaintiffs must establish (1) that they have  
27 suffered an injury in fact, (2) that their injury is fairly traceable to a  
28 defendant’s conduct, and (3) that their injury would likely be  
redressed by a favorable decision. . . . At the pleading stage,  
“general factual allegations of injury resulting from the defendant’s

1 conduct may suffice."

2 *Mecinas v. Hobbs*, 30 F.4th 890, 896-97 (9th Cir. 2022).

3 Where a plaintiff is an organization, there can be either associational standing (also known  
4 as representational standing) and/or organizational standing.

5 "Organizational standing . . . turn[s] on whether the organization  
6 itself has suffered an injury in fact." By contrast, associational  
standing is where "[an organization] can establish standing only as  
7 representative[] of those of [its] members who have been injured in  
fact, and thus could have brought suit in their own right."

8 *Women's Student Union v. United States Dep't of Educ.*, No. 21-cv-01626-EMC, 2021 U.S. Dist.  
9 LEXIS 167220, at \*13-14 (N.D. Cal. Sept. 2, 2021).

10 In the instant case, OFW asserts only organizational standing. The Supreme Court's  
11 decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), is the benchmark case on  
12 organizational standing. The organizational plaintiff in *Havens* was HOME, a nonprofit "whose  
13 purpose to 'to make equal opportunity in housing a reality in the Richmond Metropolitan Area. . . .  
14 Its activities included the operation of a housing counseling service, and the investigation and  
15 referral of complaints concerning housing discrimination." *Id.* at 368. HOME, along with some  
16 individual plaintiffs, sued Havens, the owner of two apartment complexes, on the basis that it had  
17 engaged in racial steering practices (*i.e.*, falsely telling black renters that apartments were not  
18 available). HOME claimed injury because Havens's steering practices "frustrated the  
19 organization's counseling and referral services, with a consequent drain on resources." *Id.* at 369;  
20 *see also id.* at 379 (taking note of HOME's allegation that it "has been frustrated by defendants'  
21 racial steering practices in its efforts to assist equal access to housing through counseling and other  
22 referral services[;]" Plaintiff HOME has had to devote significant resources to identify and  
23 counteract the defendant's [sic] racially discriminatory steering practices"). The Supreme Court  
24 held:

25 If, as broadly alleged, [Havens's] steering practices have perceptibly  
26 impaired HOME's ability to provide counseling and referral services  
27 for low- and moderate-income home-seekers, there can be no  
28 question that the organization has suffered injury in fact. Such  
concrete and demonstrable injury to the organization's activities –  
with the consequent drain on the organization's resources –  
constitutes far more than simply a setback to the organization's

1 abstract social interests.

2 *Id.*; see also *Rodriguez v. City of San Jose*, 930 F.3d 1123, 1134 (9th Cir. 2019) (discussing  
3 *Havens*).

4 Based on *Havens*,

5 an organization may establish "injury in fact if it can demonstrate:  
6 **(1) frustration of its organizational mission; and (2) diversion of  
its resources to combat the particular [conduct] in question.**"

7 *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir.  
8 2004). For example, in *East Bay Sanctuary Covenant v. Trump*, 909  
9 F.3d 1219 (9th Cir. 2018), as amended by 932 F.3d 742 (9th Cir.  
10 December 7, 2018), the plaintiff organizations created "education  
11 and outreach initiatives regarding the [challenged] rule." *Id.* at  
12 1242. In *National Council of La Raza v. Cegavske*, 800 F.3d 1032  
13 (9th Cir. 2015), to counteract alleged voter registration violations,  
14 civil rights groups "expend[ed] additional resources" that "they  
15 would have spent on some other aspect of their organizational  
16 purpose." *Id.* at 1039. In these cases, the plaintiffs were not "simply  
17 going about their 'business as usual,'" *id.* at 1040-41, but had altered  
18 their resource allocation to combat the challenged practices, *see also*  
19 *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013)  
20 (finding organizational standing where the plaintiffs "had to divert  
21 resources to educational programs to address its members' and  
22 volunteers' concerns about the [challenged] law's effect"); *Fair  
23 Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666  
24 F.3d 1216, 1219 (9th Cir. 2012) (finding organizational standing  
25 where the plaintiff, in response to the defendant's challenged  
26 practices, "started new education and outreach campaigns targeted at  
discriminatory roommate advertising"); *Comite de Jornaleros de  
Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943-44  
(9th Cir. 2011) (finding organizational standing where resources  
directed toward "assisting day laborers during their arrests and  
meeting with workers about the status of the [challenged] ordinance  
would have otherwise been expended toward [the advocacy group's]  
core organizing activities"); *Smith*, 358 F.3d at 1105 (finding  
organizational standing where complaint was dismissed without  
leave to amend and plaintiff alleged it "divert[ed] its scarce  
resources from other efforts" so it could "monitor the [subject]  
violations and educate the public regarding the discrimination");  
*Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)  
(finding organizational standing where plaintiff alleged it had  
expended thousands of dollars to "redress[] the impact" of  
defendant's discrimination and, as a result, was unable "to undertake  
other efforts to end unlawful housing practices"); *El Rescate Legal  
Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742,  
748 (9th Cir. 1991) (finding organizational standing where plaintiffs  
"expend[ed] resources in representing clients they otherwise would  
spend in other ways").

27 *Am. Diabetes Ass'n v. United States Dep't of the Army*, 938 F.3d 1147, 1154-55 (9th Cir. 2019)  
28 (emphasis added). Standing obtains where the plaintiff

1 would have suffered some other injury if it had not diverted  
2 resources to counteracting the problem. In *Havens*, for example,  
3 housing discrimination threatened to make it more difficult for  
4 HOME to counsel people on where they might live if the  
organization didn't spend money fighting it. The organization could  
not avoid suffering one injury or the other, and therefore had  
standing to sue.

5 *La Asociacion De Trabajadores De Lake v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir.  
6 2010).

7 In *American Diabetes*, the Ninth Circuit held that the plaintiff had failed to make sufficient  
8 allegations in support of standing in its complaint. The plaintiff was a “nonprofit with a mission  
9 ‘to prevent and cure diabetes and to improve the lives of those affected by diabetes.’” *Am.*  
10 *Diabetes*, 938 F.3d at 1150. Activities conducted by the nonprofit in furtherance of its mission  
11 included advocacy for laws that keep children with diabetes safe at school and provision of legal  
12 information and assistance to individuals and families experiencing diabetes-related  
13 discrimination. *See id.* The nonprofit sued the army on the basis that it engaged in diabetes-  
14 related discrimination in its youth programs. The nonprofit claimed that it suffered injury in its  
15 own right because it had “diverted resources to combat [a] New Policy.” *Id.* at 1154.

16 The Ninth Circuit found that the nonprofit had failed to adequately allege standing. “[T]he  
17 only resource the Association claims it diverted as a result of the New Policy [being challenged] is  
18 the time one of its two staff attorneys took to handle a single intake call”; this was just business as  
19 usual because Association's staff attorneys

20 dedicate a portion of their time to taking calls, and one [person] used  
21 that service. The Association has not shown that, . . . as a result of  
22 the New Policy, the Association had altered or intended to alter its  
resource allocation to allow its attorneys to take a higher volume of  
calls or separately address the New Policy.

23 *Id.* at 1155.

24 On the other hand, in *Sabra v. Maricopa County Community College District*, 44 F.4th 867  
25 (9th Cir. 2022), the Court of Appeals rejected the district court's conclusion that a nonprofit  
26 organization "committed to advocacy and protecting the civil rights of American Muslims"  
27 lacked standing to challenge a module on Islamic terrorism taught in a college course on the basis  
28 that it failed to show "how its remedial actions – developing a public-awareness campaign to

1 combat Islamophobia – fell outside ‘the realm of [its] normal advocacy.’” *Id.* at 878-79. In fact,  
2 the organization alleged that, “in response to [the professor’s] allegedly harmful depiction of  
3 Islam, it went out of its way to develop a public-awareness campaign rebutting the information in  
4 [the] course, ‘divert[ing] [its] resources’ by contracting with a religious scholar who assisted in  
5 creating materials for the campaign.” *Id.* at 880. This was sufficient to confer Article III standing.  
6 *See id.*

7 C. Injury in Fact

8 Darden argues first that OFW has failed to establish standing because it has not suffered a  
9 cognizable injury in fact.

10 As a preliminary matter, the Court notes that both parties largely focus on one specific  
11 theory of injury – *i.e.*, Darden employees who want to help OFW in its advocacy efforts are unable  
12 to do so because the “free” time they have (*i.e.*, not working at a Darden restaurant) is taken up by  
13 working more hours (to make up for the low pay) or addressing the effects of the sex and/or race  
14 discrimination. OFW characterizes this as being *deprived* of “its most important resource” –  
15 employee voices in its advocacy work. Opp’n at 1; *see also* SAC ¶ 98 (alleging that the policies  
16 have “deprived One Fair Wage of its most valuable resource – employee voices – forcing One  
17 Fair Wage to conduct [a] Survey out of self-preservation”).

18 This alleged impairment to OFW’s resources in carrying out its mission is sufficient to  
19 state a *prima facie* basis for standing. OFW has addressed the deficiency previously identified by  
20 the Court. Specifically, the Court criticized OFW for making “no showing that employees . . .  
21 cannot find the time and will not make the effort to volunteer their stories to OFW.” Docket No.  
22 54 (Order at 11). OFW has now provided at least two concrete examples of employees who  
23 would have done more if they could have – *i.e.*, Ms. Melton and Mr. Youssef. And it can  
24 reasonably be inferred that there are others based off of other allegations in the SAC. *See, e.g.*,  
25 SAC ¶ 129 (alleging that, according to OFW’s Chief of Staff, Senior Director, and Co-Founder  
26 (Fekkak Mamdouh), “it is common for recipients of cash assistance from the Fund to want to help  
27 One Fair Wage,” but they cannot because they do not “have enough free time to do so [as] they  
28 need to work more to offset their discriminatorily low wages; they are spending their non-work

1 time dealing with the repercussions of discrimination and/or harassment; and they fear retaliation  
2 from Darden . . . if they speak out”).

3 The situation here is analogous to that in *East Bay Sanctuary Covenant v. Biden*, 993 F.3d  
4 640 (9th Cir. 2021). In *East Bay Sanctuary*, the plaintiffs were organizations that represented  
5 current and future asylum seekers. They challenged an agency rule that stripped asylum eligibility  
6 from migrants who crossed into the United States between designated ports of entry. *See id.* at  
7 658. The Ninth Circuit held that the organizations had organizational standing to file suit.  
8 “[B]ecause the Rule significantly discourages a large number of [asylum-seekers] from seeking  
9 asylum given their ineligibility,’ the Rule frustrates their mission.” *Id.* at 663. In essence, the rule  
10 took away the organizations’ customers. Here, Darden’s conduct is (as alleged) effectively taking  
11 away OFW’s volunteers.

12 To the extent Darden has cited *City of Philadelphia v. Beretta U.S.A.*, 126 F. Supp. 2d 882  
13 (E.D. Pa. 2000), in support, that authority is not binding on this Court. *See id.* at 897 (stating that  
14 “[i]t is . . . disturbing that the organizational plaintiffs [*i.e.*, civic organizations] argue that they  
15 may sue for the costs of educational sessions and other programs which they run to counteract gun  
16 violence[;] [b]y this logic, any social action organization may confer standing upon itself by  
17 voluntarily spending money on the social problem of its choice”). Moreover, the *Beretta* court  
18 made the statement above in assessing associational standing and not organizational standing, and  
19 the statement was dicta. The court found a standing problem based on the traceability prong of  
20 standing, not the injury-in-fact prong. *See id.* at 897 (noting that “the gun manufacturers’ products  
21 lawfully enter into the stream of commerce[;] [i]llegal conduct and harm to the plaintiffs only  
22 occurs because of several intervening actions by independent individuals: the federally licensed  
23 dealer must sell the gun[,] the straw buyer must resell it [to a felon or someone else who is not  
24 able to legally obtain or possess firearms][,] the criminal must use it” – and “[n]one of these are  
25 natural consequences of the gun manufacturers’ distribution scheme”).

26 Furthermore, the SAC suggests two more alleged injuries (albeit related to the injury  
27 claimed above):

28 (1) Because OFW has been deprived of the voices of Darden employees, it has had to

1 divert resources to finding replacement voices. *See* SAC ¶ 93 (“As a result of  
2 Darden’s policies eating up its employees’ precious non-work time – time that  
3 otherwise could have and would have been spent helping One Fair Wage pursue  
4 their shared interest – One Fair Wage has been forced to work harder and expend  
5 more of its time, energy, focus, and resources to secure as advocates workers who  
6 have experienced the harms wrought by subminimum cash wage policies and  
7 unmitigated tipping policies and are ready, willing, and able to speak out against  
8 those policies in lobbying efforts.”).

9 (2) Because Darden employees have been subjected to Darden’s policies, OFW has  
10 had to divert its resources to help them – *e.g.*, “connecting complaining Darden  
11 workers with attorneys to represent them in dispute resolution against Darden,  
12 connecting sexual harassment survivors at Darden with therapists and other social  
13 service providers, and offering job opportunities and administering payments from  
14 a Coronavirus Emergency Relief Fund to Darden workers who complained of  
15 increased sexual harassment and/or race-based tip differentials.” SAC ¶ 94  
16 (emphasis added). One Fair Wage has spent time on this activity “instead of  
17 spending its time lobbying or advocating.” SAC ¶ 95; *see also* SAC ¶¶ 96-97  
18 (alleging that OFW’s President spends “significant” time dealing with complaints  
19 from Darden employees; that OFW’s Research Director (Julia Sebastian) “spends  
20 roughly one-fourth of her time . . . dealing with such complaints from Darden  
21 employees and otherwise responding to the effects of the policies on those  
22 employees instead of directing her efforts toward lobbying”; and that “[m]any other  
23 One Fair Wage employees and consultants have spent at least a portion of their  
24 work time dealing with such complaints and otherwise responding to the effects of  
25 the policies on Darden employees instead of organizing and hosting lobbying or  
26 advocacy events”). This work seems to have been done *independent* of any effort  
27 on the part of OFW to get the Darden employees to be a voice on behalf of the  
28 organization.

1 Notably, the second injury is the typical kind of injury recognized under *Havens*.<sup>3</sup> See,  
2 e.g., *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943-44  
3 (9th Cir. 2011) (finding organizational standing where resources directed toward "assisting day  
4 laborers during their arrests and meeting with workers about the status of the [challenged]  
5 ordinance would have otherwise been expended toward [the advocacy group's] core organizing  
6 activities"). *Compare Am. Diabetes*, 938 F.3d at 1155 (stating that "the only resource the  
7 Association claims it diverted as a result of the New Policy [being challenged] is the time one of  
8 its two staff attorneys took to handle a single intake call"; this was just business as usual because  
9 Association's staff attorneys dedicate a portion of their time to taking calls, and one [person] used  
10 that service," and "[t]he Association has not shown that, . . . as a result of the New Policy, the  
11 Association had altered or intended to alter its resource allocation to allow its attorneys to take a  
12 higher volume of calls or separately address the New Policy").

13 Darden protests that this "miss[es] the big picture": that "[w]hat causes an injury to a  
14 service organization is not analogous to what causes an injury to an advocacy organization." Mot.  
15 at 5; *see also* Reply at 4 (arguing that "advocacy organizations like OFW claiming injury from the  
16 very conduct that birthed the organization into existence is far from analogous to standing  
17 decisions concerning direct service organizations whose operations were fundamentally frustrated  
18 by the defendant's actions"). But this argument is not persuasive.

19 First, the case law does not draw distinctions between service organizations and advocacy  
20 organizations. Second, it is not clear why an advocacy organization could not assert a diversion of  
21 resources where it had to provide direct services it typically does not provide and the provision of  
22 such services takes away from its normal advocacy efforts. Third, the underlying argument  
23 Darden seems to be making here is that its cash wage and tipping policies – the alleged  
24 misconduct – "provide[] OFW with its organizational advocacy mission (*it does not frustrate*

25 <sup>3</sup> The Court acknowledges that, in a prior order, it commented as follows: "it does not appear that  
26 OFW's mission includes providing representation and counseling to individual employees; thus, it  
27 could be contended that providing advice and referrals to Darden employees was a voluntary  
28 activity not required pursuant to its mission." Docket No. 30 (Order at 23). However, the Court  
made no definitive ruling one way or the other as it never adjudicated Article III standing in this  
order.

1 *mission*). In other words, if restaurant companies, like Darden, eliminated the use of the tip credit,  
2 then OFW would have no organizational purpose.” Mot. at 6 (emphasis added). But this  
3 argument makes no sense: OFW’s mission is to *end* policies such as Darden’s because they harm  
4 tipped employees; Darden’s policies therefore frustrate OFW’s mission. The fact that if OFW  
5 were someday to achieve its mission to end that practice does not negate its mission.

6 Darden takes out of context the Court’s statement from its prior order that “the challenged  
7 policies would [seem] to drive impacted employees to OFW.” Docket No. 54 (Order at 11).  
8 Following that statement, the Court then noted that such employees “would be incentivized to  
9 work with an organization such as OFW to protect their rights” – *i.e.*, “[t]here is no showing that  
10 employees . . . cannot find the time and will not make the effort to volunteer their stories to  
11 OFW.” Docket No. 54 (Order at 11). The Court’s observation was based on the prior pleading.  
12 The SAC now clearly asserts that at least some employees, despite their desire to join OFW’s  
13 work, are in fact obstructed from doing so because of Darden’s wage policies.

14 Accordingly, the Court finds that OFW has sufficiently alleged an injury in fact (for  
15 purposes of standing) by virtue of the fact that it has had to divert resources away from advocacy  
16 efforts so that it may provide, in effect, direct services.

17 D. Traceability

18 Because OFW has sufficiently pled an injury in fact, the next issue is whether OFW has  
19 demonstrated that its injury “is fairly traceable to the challenged conduct of the defendant, and not  
20 the result of the independent action of some third party not before the court.” *Lujan v. Defs. Of*  
21 *Wildlife*, 504 U.S. 555, 561 (1992). Traceability requires “a causal connection between the injury  
22 and the conduct complained of.” *Id.*

23 The Ninth Circuit has cautioned that traceability should *not* be equated with proximate  
24 causation. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (noting that “Plaintiffs  
25 do not bear so heavy a burden”). While traceability “does require [a] plaintiff[] to establish a line  
26 of causation between the defendant[’s] action and [the plaintiff’s] alleged harm that is more than  
27 attenuated,” *id.* (internal quotation marks omitted), “[a] causal chain does not fail simply because  
28 it has several links, provided those links are not hypothetical or tenuous and remain plausibl[e].”

1        *Id.* (internal quotation marks omitted). “What matters is not the length of the chain of causation,  
 2        but rather the plausibility of the links that comprise the chain.” *Id.* (internal quotation marks  
 3        omitted); *see also Ecological Rts. Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1152 (9th Cir.  
 4        2000) (stating that “the causal connection put forward for standing purposes cannot be too  
 5        speculative, or rely on conjecture about the behavior of other parties, but need not be so airtight at  
 6        this stage of the litigation as to demonstrate that the plaintiffs would succeed on the merits”).

7        Notably, a “causation chain does not fail solely . . . because a single third party’s actions  
 8        intervened.” *O’Handley v. Weber*, 62 F.4th 1145, 1161 (9th Cir. 2023) (internal quotation marks  
 9        omitted). On the other hand, the Supreme Court has stated that,

10        where a causal relation between injury and challenged action  
 11        depends upon the decision of an independent third party . . . ,  
 12        “standing is not precluded, but it is ordinarily ‘substantially more  
 13        difficult’ to establish.” To satisfy that burden, the plaintiff must  
 14        show at the least “that third parties will *likely react in predictable*  
 15        ways.”

16        *California v. Texas*, 141 S. Ct. 2104, 2117 (2021) (emphasis added; citing, *inter alia*, *Dep’t of  
 17        Comm. v. N.Y.*, 139 S. Ct. 2551, 2566 (2019)<sup>4</sup>). Along similar lines, the Ninth Circuit has noted  
 18        that,

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19        <sup>4</sup> In *Department of Commerce v. New York*, a challenge was made to a decision by the Secretary of  
 20        Commerce to reinstate a question about citizenship on the 2020 census questionnaire. The suit was  
 21        brought by various plaintiffs, including state and local governments and nongovernmental  
 22        organizations that worked with immigrant and minority communities. The plaintiffs claimed a  
 23        number of injuries as a result of the Secretary’s decision: “diminishment of political representation,  
 24        loss of federal funds, degradation of census data, and diversion of resources – all of which turn on  
 25        their expectation that reinstating a citizenship question will depress the census response rate and  
 26        lead to an inaccurate population count.” *Dep’t of Commerce v. New York*, 139 S. Ct. at 2565. The  
 27        federal government argued that “any harm to respondents is not fairly traceable to the Secretary’s  
 28        decision, because such harm depends on the independent action of third parties choosing to violate  
 29        their legal duty to respond to the census.” *Id.* The federal government also argued that “[t]he  
 30        chain of causation is made even more tenuous” because it was based on the third parties being  
 31        “motivated by unfounded fears that the Federal Government itself will break the law by using  
 32        noncitizens’ answers against them for law enforcement purposes.” *Id.* at 2565-66.

33        The Supreme Court rejected these arguments, explaining that, “in these circumstances,  
 34        respondents have met their burden of showing that third parties will likely react in predictable  
 35        ways to the citizenship question, even if they do so unlawfully and despite the requirement that the  
 36        Government keep individual answers confidential.” *Id.* at 2566. “Respondents’ theory of standing  
 37        . . . does not rest on *mere speculation* about the decisions of third parties; it relies instead on the  
 38        *predictable effect* of Government action on the decisions of third parties.” *Id.* (emphasis added).

when a plaintiff alleges that government action caused injury by influencing the conduct of third parties, we've held that "more particular facts are needed to show standing." That's so because the third parties may well have engaged in their injury-inflicting actions even in the absence of the government's challenged conduct. To plausibly allege that the injury was "not the result of the independent action of some third party," the plaintiff must offer facts showing that the government's unlawful conduct "is at least a *substantial factor motivating the third parties' actions.*" So long as the plaintiff can make that showing without relying on "speculation" or "guesswork" about the third parties' motivations, she has adequately alleged Article III causation.

*Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014) (emphasis added); *see also id.* at 1014-15 (finding traceability because "[w]hat Mendia needed to allege is that the immigration detainer was at least a substantial factor motivating the bail bondsmen's refusal to do business with him, and he's done that"; "[w]hen ICE announces that it 'seeks custody of an alien . . . for the purpose of arresting and removing the alien,' there's certainly a higher risk that, if released on bail from state custody, the alien might not be around to make his court dates").<sup>5</sup>

In the instant case, Darden argues that the causal connection between its policies and OFW's alleged harm is attenuated (and therefore traceability is a problem) because OFW's injury "necessarily derives from its allegations that Darden's *customers* sexually harass Darden's female employees and do not tip Darden's female and non-white employees equally to how they tip Darden's male and white employees." Mot. at 7 (emphasis in original). A similar argument based on customer preferences applies with respect to the racial discrimination claim.

Although the parties have not done so, the Court addresses the sexual harassment claim and the race discrimination claim separately.

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<sup>5</sup> The Ninth Circuit has further noted that, "[i]n cases where a chain of causation involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries, the Supreme Court and this court have found the causal chain too weak to support standing at the pleading stage." *Maya*, 658 F.3d at 1070 (internal quotation marks omitted). *See, e.g., Allen v. Wright*, 468 U.S. 737, 739, 757, 759 (1984) (where plaintiffs (parents of black public school children) sued the IRS for failing to adopt "sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools," holding that, for purposes of standing, "[t]he line of causation between [the IRS's] conduct and desegregation of [the] schools is attenuated at best"; the chain of causation "involves numerous third parties (officials of racially discriminatory schools receiving tax exemptions and the parents of children attending such schools) who may not even exist in respondents' communities and whose independent decisions may not collectively have a significant effect on the ability of public school students to receive a desegregated education").

1        1. Sexual Harassment Claim

2        As an initial matter, the Court notes that OFW claims the cash wage policy increases  
3 sexual harassment by not only customers but also managers and coworkers. Darden's argument  
4 fails to address managers and coworkers.

5        With respect to customers, OFW contends that female employees, in order to obtain  
6 desperately needed tips, must dress and behave in ways that solicit customer favor and this,  
7 predictably leads to increased sexual harassment. These allegations are plausible (indeed, are  
8 arguably predictable), especially in light of the empirical and anecdotal evidence referred to in the  
9 SAC which indicates subminimum wage employees do have higher incidents of sexual harassment  
10 compared to minimum wage employees. *See, e.g.*, SAC ¶ 61 (referencing a report that found  
11 “[w]omen workers earning their state’s full minimum wage before tips reported half the rate of  
12 sexual harassment as women in the states that pay \$2.13 per hour”);

13        Moreover, as OFW points out, Darden managers know about the cash wage policy and  
14 therefore have an incentive to have customers pay as much in tips as possible (*i.e.*, so that Darden  
15 does not have to make up the difference); “[t]his, in turn, means that managers have an incentive  
16 to ignore, indulge, or even encourage sexual harassment, including requiring or encouraging  
17 employees to flirt or dress suggestively.” SAC ¶ 4. This causal chain is also plausible. *See*  
18 *Mendia*, 768 F.3d at 1014-15 (finding traceability because “[w]hat Mendia needed to allege is that  
19 the immigration detainer was at least a substantial factor motivating the bail bondsmen’s refusal to  
20 do business with him, and he’s done that”; “[w]hen ICE announces that it ‘seeks custody of an  
21 alien . . . for the purpose of arresting and removing the alien,’ there’s certainly a higher risk that, if  
22 released on bail from state custody, the alien might not be around to make his court dates”).

23        As for harassment by managers and/or coworkers, as noted above, Darden did not address  
24 such harassment. Consistent with the above, however, because managers likely know about the  
25 cash wage policy, it is plausible that a manager would engage in sexual harassment by telling  
26 employees to flirt or dress in a particular way so as to maximize tips from customers (which would  
27 then let Darden off the hook in terms of making up the difference). Although arguably a closer  
28 call, it is also plausible that a manager or coworker is more likely to sexually harass a

1 subminimum wage employee since that employee is heavily dependent on tips as part of her wage  
2 and therefore is less willing to protest harassment when the manager or coworker could retaliate  
3 (e.g., by giving a worse shift or by messing up a food order). Again, the empirical and anecdotal  
4 evidence cited by OFW supports plausibility.

5 To be sure, it seems likely that, even without a cash wage policy such as Darden's, a  
6 customer could still feel entitled to act inappropriately because he is holding a tip over the  
7 employee's head, or a manager would be emboldened to sexually harass because of the power he  
8 exerts over the employee's shift. But OFW does not dispute that there is sexual harassment in the  
9 absence of a cash wage policy. OFW's point is simply that such a policy makes the situation  
10 worse. This is plausible for purposes of stating a *prima facie* case of standing at the pleading  
11 stage.

12 2. Race Discrimination Claim

13 For the race discrimination claim, OFW claims there are race-based tip differentials  
14 because of conduct by customers and managers – customers because they tip white employees  
15 more than nonwhite employees (an assertion apparently supported by empirical and anecdotal  
16 evidence, *see, e.g.*, SAC ¶ 71 (discussing poll conducted by OFW of Darden employees); SAC ¶¶  
17 76-77 (citing articles on racially discriminatory tipping)), and managers because they have the  
18 ability to assign worse shifts to nonwhite employees.

19 Similar to above, the Court does not find a traceability problem. In light of the empirical  
20 and anecdotal evidence cited by OFW, the causal connection between Darden's failure to act and  
21 the race discrimination suffered by nonwhite employees is neither speculative nor attenuated; it is  
22 plausible. *See Ecological Rts. Found.*, 230 F.3d at 1152 (9th Cir. 2000) (stating that "the causal  
23 connection . . . need not be so airtight at this stage of the litigation as to demonstrate that the  
24 plaintiffs would succeed on the merits").

25 E. Redressability

26 Because the Court has found sufficient allegations to support traceability, redressability is  
27 similarly not an issue. In its papers, Darden makes a redressability argument related to OFW's  
28 injury in fact based on the volunteer theory. *See* Mot. at 8 (arguing that the Court would have to

“impermissibly speculate that if Darden’s cash wage and tipping policies did not exist then former employees like Jillian Menton and Zain Youssef would have spent more time helping OFW”). But Darden posits no contrary evidence, and given the posture of the current motion, the Court credits the allegations because they are not implausible. Further, Darden ignores the additional injury in fact claimed by OFW based on the diversion-of-resources theory. Furthermore, to the extent Darden raises a due process concern, that seems to be an issue separate from that of redressability; it appears more relevant to the issue of statutory standing. *See* Mot. at 9 (arguing that “Darden is unable to invoke the doctrine of issue preclusion on any duplicative disparate impact claim asserted by any Darden employee in future litigation because said employees are not in privity with OFW”).

### III. CONCLUSION

For the foregoing reasons, the Court rejects Darden’s 12(b)(1) facial challenge to OFW’s Article III standing. But, as the Court held in its prior order, OFW lacks statutory standing, and therefore dismissal of this case is appropriate. *See* Docket No. 30 (Order at 23, 28).

However, the Court shall temporarily defer the entry of a final judgment in favor of Darden because, at the hearing, OFW suggested that the Court should reconsider its prior order holding there was no statutory standing. OFW referred the Court to the Ninth Circuit briefing on the issue. Motions for reconsideration in this District are subject to Civil Local Rule 7-9. The Court shall give OFW three weeks to decide whether to file a motion for leave to file a motion for reconsideration consistent with Civil Local Rule 7-9(b). Within three weeks, OFW shall file such a motion or shall file a statement indicating that it will not be filing such a motion. If OFW does

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1 file a motion, then Darden shall have two weeks to file an opposition. There shall be no reply  
2 absent further order of the Court. If OFW does not file such a motion, the Court will enter final  
3 judgment.

4 This order disposes of Docket No. 59.

5

6 **IT IS SO ORDERED.**

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8 Dated: March 5, 2024

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EDWARD M. CHEN  
United States District Judge

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United States District Court  
Northern District of California